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No. ———

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

BRUCE CURETON, et al.,
Petitioners,

v.

GARY G. SHARPE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether local government employees suing supervisory officials under 42 U.S.C. §1983 individually for damages based on First Amendment retaliation claims must demonstrate that they have suffered, at a minimum, some materially adverse employment action beyond lateral transfer with no change in pay, title, benefits or job status, or the denial of a modest, discretionary merit pay/bonus in order to state a claim of a constitutional violation and/or defeat the defense of qualified immunity?

LIST OF PARTIES TO THE PROCEEDING

Respondents/Plaintiffs in the proceeding are five firefighters employed by the City of Knoxville, Gary G. Sharpe, William G. Potter, Kenneth F. Scarborough, Frank E. Potter and William H. McGinnis.

Petitioners/Defendants herein are Bruce Cureton, the former Fire Chief with the City of Knoxville, Victor Ashe, the Mayor of the City of Knoxville and Robert Pressley, the Deputy Fire Chief of the Knoxville Fire Department. The City of Knoxville is also a Defendant, but not a party to this appeal. There are no parent companies nor corporate entities involved in the proceeding.

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The opinion of the United States Court of Appeals for the Sixth Circuit upon which this Petition for Writ of Certiorari is filed is unreported but is contained in the Appendix at Page la. The Order of the United States District Court for the Eastern District of Tennessee at Knoxville, from which Defendants appealed to the Sixth Circuit, is likewise unreported but found in the Appendix at Page 18a with the accompanying Memorandum Opinion of the district court in the Appendix beginning at Page 20a.

STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of this Court is predicated on 28 U.S.C. §1254(1) and 28 U.S.C. §2101. The Judgment of the United States Court of Appeals for the Sixth Circuit was filed January 13, 1999. (App.* at la). Petitioners/Defendants filed a Petition for Panel Rehearing (App. at 8a), which was denied on February 11, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution found at App. at 68a. The pertinent statute, 42 U.S.C. §1983, is found at App. at 69a.

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* "App." refers to the materials appended to this Petition.

STATEMENT OF THE CASE

Respondents/Plaintiffs filed this action asserting claims under 42 U.S.C. §1983 in the district court on October 24, 1996. The district court had federal subject matter jurisdiction over this action predicated on 28 U.S.C. §1331. Plaintiffs, all employed as firefighters with the City of Knoxville, alleged that Defendants violated their First Amendment rights to free speech and association by retaliating against them because of either their support of Mayor Ashe's opponent in the 1995 Knoxville mayoral election or merely their failure to support Mayor Ashe in his election bid. (Memorandum Opinion of District Court, App. at 2la). The retaliation was in the form of lateral transfers and the denial of discretionary merit pay awarded once a year to varying members of approximately one-third of the Fire Department. Plaintiff Sharpe, only, alleged retaliation in the form of non-selection for a promotion and the denial of discretionary merit pay.

The individual Defendants/ Petitioners herein all filed Motions to Dismiss or in the Alternative for Summary Judgment asserting that the personnel actions at issue did not rise to the level of a constitutional violation, or in the alternative, were not sufficiently adverse as to put Defendants on notice that the personnel actions violated clearly established law thereby defeating their defense of qualified immunity. (App. at 4la, 45a, 49a).

In an Order and Memorandum Opinion, the district court denied Defendants' Motion to Dismiss or in the Alternative for Summary Judgment on the merits of Plaintiffs' First Amendment claims, and denied Defendants' assertion of qualified immunity. (App. at pp. 18a, 20a) The district court concluded, inter alia, that the alleged adverse employment

actions need not be substantial to state a claim under the First Amendment and to defeat a claim of qualified immunity. (App. at pp. 18a, 20a)

Defendants timely filed a Notice of Interlocutory Appeal to the United States Court of Appeals for the Sixth Circuit of the district court's denial of qualified immunity under the authority of Behrens v. Pelletier, __U.S. __ , 116 S.Ct. 834 (1996), and Johnson v. Jones, 515 U.S. 304 (1995). The United States Court of Appeals for the Sixth Circuit accepted interlocutory appellate jurisdiction and held that this Court's decision in Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), established the clear unlawfulness of any personnel action taken in retaliation for the exercise of First Amendment rights, citing the "failure to hold a birthday party" dicta from the majority opinion in Rutan. 497 U.S. 62, 75 n. 8 (6th Cir. Opinion, App at. 6a).

FACTS RELATING TO PLAINTIFFS' TRANSFERS

Involuntary transfers of firefighters from station to station within the City of Knoxville occur frequently based on staffing needs, but in this instance, the transfers must be assumed retaliatory. (6th Cir. Opinion footnote 1, App. at 5a.) Plaintiffs Scarborough and Potter allege that their intra-city transfers to neighboring fire stations was in retaliation for their political support of Mayor Ashe's opponent. (District Court Memorandum Opinion, App. at 2la.) Plaintiff McGinnis alleges he was transferred to another fire station within the City because he did not support either candidate for Mayor. (Id.; App. at 22a). As recognized by the district court, it is undisputed that Plaintiffs Scarborough, Frank Potter and McGinnis were transferred to different firehalls with no change in rank, pay, duties or hours. (Id.; App. at 25a). The three were returned to their favored fire

stations within one year.

Plaintiff William Potter (Frank Potter's brother) is a Deputy Chief, the third highest ranking member of the Knoxville Fire Department. (Id.; App. at 22a). William Potter complains of two transfers. (Id.).

First, William Potter complains of his reassignment from an abolished position in the Administrative Offices of the Fire Department to an assignment evaluating the Fire Department's response to major alarm calls, including emergency medical first responder calls, although William contends he had no experience or training for evaluating the medical calls. (Id.; App. at 22a.) It is undisputed that William Potter's former superfluous position in administration over firefighting was abolished and never refilled after his transfer to the Firefighting Division. (Armstrong Affidavit; App. at 59a.)

William Potter sustained no loss in compensation or benefits as a result of his first transfer from the Administrative Offices. (Armstrong Affidavit, App. at 59a). After the first transfer, William Potter continued to work the same forty hour shift and, significantly, was relieved of the responsibility of being on twenty-four-hour call. (Id.).

After six months in this experimental position, William Potter was transferred to a position as Commander of one of the City's three firefighting shifts. (Armstrong Affidavit; App. at 59a.) Upon Deputy Chief Potter's second transfer back to the Firefighting Division as a Shift Chief (the same position he worked prior to his assignment at the Administrative Offices), William Potter maintained the same rank classification and base salary, but he began working shifts consisting of a maximum of ten twenty-four hour shifts

during a twenty-eight day work period. (Id.; App. at 59a.) As with the two other Shift Commanders in the Department, William Potter worked an average of fifty-six hours per week, and, accordingly, was compensated for overtime. (Id.; App. at 59a.) The effective change in William Potter's hourly rate after his transfer from a forty hour position to a fifty-six hour position as Deputy Chief of a firefighting shift was approximately 25 cents less per hour. (Id.; App. at 60-61a). However, because of overtime pay, from the period of William Potter's second ransfer up through the time of the Summary Judgment proceedings in the district court, William Potter's compensation increased from $58,696.52 to $80,358.51. (Id.; App. at 6la.) Thus, William Potter received $21,661.99 in additional compensation as a result of his transfer to command of a Firefighting Shift. William Potter is paid more as a result of the transfer than either of the other two firefighting Deputy Chief Shift Commanders. (Id.; App. at 6la).

The City of Knoxville Charter creates a civil service personnel system applicable to all of the Plaintiffs. (Excerpt of Charter, App. at pp. 52a-55a). Therein, a Civil Service Merit Board is created with the power, duty and authority to designate a hearing examiner to hear employee appeals relative to any personnel action, including but not limited to alleged discrimination in disciplinary action, transfers, or promotions. (Id.; App. at 54a). Shortly after their 1996 transfers, all the Plaintiffs herein promptly filed grievances before the Knoxville Civil Service Merit Board. (Exhibit, App. at 56a.) A hearing officer was assigned to conduct a hearing on the issues raised, but Plaintiffs, through counsel, unilaterally stayed those proceedings in December of 1996 in favor of pursuing the instant claim in federal court. (Order Staying Grievance, App. at 56a.)

FACTS RELATING TO PLAINTIFFS' CLAIMS REGARDING MERIT PAY

The Knoxville Fire Department has 370 employees, and is the second largest department in the City, which has a total of 1620 total full-time employees. (Armstrong Affidavit, App. at 64a.) The Department used to award annually modest bonuses, ranging from several hundred dollars to pay step increases of two and a half percent and in very limited cases five percent of an employee's salary, as merit pay to varying members of the approximately one third of the Fire Department. All five Plaintiffs contend that they were twice passed over in a two-year period for this merit pay based upon their non-support of Mayor Ashe. (District Court Memorandum Opinion; App. at 21a-22a). (William Potter received a five hundred dollar bonus after Ashe's election but refused it.)

FACTS RELATING TO DISTINCT CLAIM OF GARY SHARPE

Plaintiff Gary Sharpe alleges that, although he scored the sixth highest score out of thirty-nine applicants on the civil service exam for a promotion, he was not one of the twenty-five applicants promoted because of his support for Mayor Ashe's opponent. (District Court Memorandum Opinion; App. at 23a). Accepting the existing state of the law in the Sixth Circuit concerning the failure to promote as a sufficiently adverse employment action to state a claim under §1983, Defendants did not assert below that Sharpe's non-promotion allegations failed to state a claim upon which relief could be granted. However, before this Court, Defendants adopt and urge the position of the four dissenting Justices in Rutan, that would go no further than to allow a

federal cause of action when the employee has actually been dismissed from employment. 497 U.S. at 115-116 (Scalia J. Dissenting).

FACTS RELATING TO DISTINCT CLAIM OF WILLIAM POTTER

As an example of the extent to which the Plaintiffs herein are seeking to elevate every personnel grievance into a constitutional claim requiring micro-management by the federal courts, William Potter alleges that Mayor Ashe refused to consider a pension modification request covering the City's pension plan of which he is a member. (Defendants' Motion to Dismiss or in the Alternative for Summary Judgment With Respect to Claim of William Potter; Joint App. at pp. 45a-46a). It is undisputed that, under Knoxville's City Charter, any and all amendments to the City's pension plans would require an amendment to the City Charter passed through referendum by a majority vote of the citizens of Knoxville. (Armstrong Affidavit; App. at pp. 62a, 64a). None of the individual Defendants has any authority or power to modify the pension plans. (Id.) .

LAW AND ARGUMENT

I. **THIS COURT SHOULD GRANT THE INSTANT PETITION FOR WRIT OF CERTIORARI BECAUSE THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THROUGH ITS CONSTRUCTION OF THIS COURT' S DECISION IN RUTAN THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, REGARDING WHETHER RUTAN EXTENDS TO MINOR EMPLOYMENT GRIEVANCES**

THEREBY ALLOWING EMPLOYEES THROUGH THE THREAT OF §1983 LAWSUITS TO INSULATE THEMSELVES FROM ANY DISFAVORED PERSONNEL ACTION AND REQUIRE THE FEDERAL COURTS TO MICRO-MANAGE LOCAL GOVERNMENT EMPLOYMENT.

The most persuasive and cogent argument for granting certiorari in this case is contained in the dissenting opinion in Rutan of Justices Scalia, Rehnquist, Kennedy and O' Connor. In explaining why the decisions of Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980), should not be extended beyond the context of actual discharge from employment based upon political affiliation, the dissent accurately forecast the impact of the majority opinion in Rutan:

> I would reject the alternative that the Seventh Circuit adopted in this case, which allows a cause of action if the employee can demonstrate that he was subjected to the "substantial equivalent of dismissal." 868 F.2d 943, 950, 954 (1989). The trouble with that seemingly reasonable standard is that it is so imprecise that it will **multiply yet again the harmful uncertainty and litigation** that Branti has already created. If Elrod and Branti are not to be reconsidered and in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is his formal title and salary.
>
> * * *
>
> The Court's opinion, of course, not only

> declines to confine Elrod and Branti to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, even extends those opinions beyond "constructive" dismissals - indeed, even beyond adverse treatment of current employees - to all hiring decisions. In the long run, there may be cause to rejoice in that extension. **When the courts are flooded with litigation under that most unmanageable of standards** (Branti) brought by that most persistent and tenacious of suitors (the disappointed office seeker) **we may be moved to reconsider our intrusion into this entire field.**

497 U.S. at 114-115. (Scalia J. Dissenting) (emphasis added). The dissenting justices in Rutan correctly noted that the majority opinion constitutionalizes civil service reform in the absolute, extending federal court intrusion into all decisions regarding the relationship between the government as an employer and its employees, as contrasted with government's regulation of its citizens. Id. at pp. 94-96. Constitutional scrutiny and adjudication of the government's allocation of personnel resources should be reserved for injuries of constitutional magnitude. Insignificant grievances of public employees such as those asserted by Plaintiffs in the instant case should be resolved in the forum created by the municipality for that purpose - the Civil Service Merit Board or like entity.

Petitioners herein respectfully submit that Rutan was wrongly decided, and moreover has been incorrectly construed and extended by the Sixth Circuit and other circuits as well. See E.g. Harris v. Victoria Independent School District, 168 F.3d 216, 220 (5th Cir. 1999) (mere transfer of high school teacher to different school to teach the same subject actionable as an adverse employment action in a First

Amendment patronage claim).

Rutan was wrongly decided. If a mere lateral transfer to a position within an employee's own rank and grade or being passed over for annual, modest, discretionary merit pay is sufficient to establish an actionable adverse employment action, government employees can subject their supervisors to lengthy litigation and jury trials regarding virtually any aspect of the terms and conditions of their employment. See Walsh v. Ward, 991 F.2d 1344, 1346 (7th Cir. 1993). If any personnel action, including something as trivial as failure to provide a birthday party to an employee is actionable, Rutan, 497 U.S. at 75 n. 8, then employees are in a position to bring the civil service system to its knees. Walsh, 991 F.2d at 1346. If the Respondents' can exact damages from Petitioners individually through protracted litigation, then employees can insulate themselves from virtually any disfavored action by their supervisors merely by periodically supporting dark horse candidates or speaking out on unpopular issues of public concern. Without a bright line drawn by this Court identifying a tangible threshold of adverse employment action that must be crossed to establish a First Amendment claim, the micro-management of all state and local government civil service systems will be in the hands of the subordinate employees and the federal courts. Under the majority decision in Rutan, as interpreted by the Sixth Circuit in the instant case, civil service employees have the capacity through the threat of protracted litigation as is exemplified by this case, to control the entire sphere of their employment environment, from what meals are served in the fireball, to who washes the dishes and who rides on what fire truck. This case poignantly illustrates the extent to which government employees can now use the First Amendment as a sword rather than a shield against their supervisors and municipal employers, and entirely supplant established civil service systems throughout local

governmental entities nationwide. Public sector employees are now bypassing in droves existing civil service remedies, just as the instant respondents are doing, and flocking to the federal courts seeking to inflict compensatory and punitive damages and §1988 attorneys fees upon their superiors regarding every employment grievance, whether significant or not. See e.g. Harris, supra. The Rutan pendulum has swung too far. Absent action by this Court, micro-management of state and local governments about virtually every aspect of employment will be removed from the hands of elected and appointed officials and placed squarely in the lap of the federal courts.

Without the requirement of a quantifiable, bright-line threshold of materially adverse employment action well beyond the personnel actions at issue in this case, the venerable First Amendment will be transmuted from a shield protecting government employees from genuine harm into a sword wielded against supervisors and municipal employers from which to secure a haven for marginal job performance. See Walsh, 991 F.2d at 1346. The current opinion by the Sixth Circuit demonstrates that no supervisor can safely make any administrative changes to improve the efficiency of his department without the threat of protracted litigation and potential personal liability.

Nor could supervisors ever safely reward with merit pay employees who provided superior service in a given year. This is true because disgruntled marginal employees who did not visibly support the administration could sue annually, claiming that patronage retaliation not job performance was the basis for being passed over for merit pay.

The federal courts and lay juries have neither the personnel management experience nor the resources to

undertake the micro-management of the administration of thousands of employees in local government institutions. See Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121,124 (5th Cir. 1991). The federal courts should hesitate out of concerns of federalism, if not self-survival regarding their dockets, to assume control over the administration and management of the myriad differing personnel systems existing throughout state and local governments. In the decade since Rutan, there has been an ever increasing deluge of lawsuits requiring the federal courts to micro-manage as super personnel directors governmental entity employers under the auspices of the First Amendment. Compare Dorsett v. Board of Trustees, 940 F.2d 121 (5th Cir. 1991) (in 1991, the Fifth Circuit required personnel actions to be materially adverse to be actionable), with Harris, 168 F.3d at 220 (in 1999, the Fifth Circuit invites an increasing flood of litigation by holding that a mere lateral transfer of a teacher to teach the same subject at a different school is actionable under Rutan).

A comparison of the requirements of "materially adverse personnel actions" in cases under Title VII, the A.D.A, and the A.D.E.A. reveals that, in those claims, the law requires that personnel actions must be sufficiently adverse before the federal courts can be required to intervene in local personnel management. E.g. Crady v. Liberty National Bank and Trust Company, 993 F.2d 132, 135-136 (7th Cir. 1993) (A.D.E.A. claim); LaRou v. Ridlon, 98 F.3d 659, 662 n. 6 (1st Cir. 1996) (meaning of adverse employment action should remain constant regardless of the theory or claim). The A.D.A.'s definition of discrimination in the terms and conditions of employment is more comprehensive than the dicta in Rutan. See 42 U.S.C. §12112(a). Nonetheless, virtually all the courts of appeals, including the Sixth Circuit, have required some workable

threshold requirement of materially adverse employment action to establish a prima facie A.D.A. case. E.g. Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 885 (6th Cir. 1996).

It is respectfully submitted that the majority opinion in Rutan offers no logical basis for eliminating the materially adverse employment action threshold in a First Amendment claim while maintaining the requirement in virtually all other employment retaliation and discrimination claims. See Stephens v. Kerrigan, 122 F.3d 171, 176 (3rd Cir. 1997) (political discrimination case should employ similar burden-shifting mechanisms as those used in other employment discrimination contexts).

The City of Knoxville Fire Department has 370 employees and a total of 1620 potential plaintiffs on its payroll. There are elections in Knoxville every two years. If Respondents herein can successfully tie the hands of City administrators in protracted litigation over minor personnel grievances, then all governmental employees can effectively secure "most favored nation" status with respect to any administrative personnel change merely by supporting the next available dark horse candidate or unpopular cause. Petitioners/Defendants respectfully submit that the personnel management minutiae such as at issue in the instant case should be resolved in the Civil Service Merit Board forum created by the City to air grievances, not the federal courts. Rutan was wrongly decided. "But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance (to overrule the precedent) ought to disappear." Rutan, 497 U.S. at 111. (Scalia J. Dissenting). As demonstrated by the Sixth Circuit opinion in the instant case, the courts have not designated a workable line of

demarcation regarding adverse employment actions in First Amendment claims in a manner that judges, lawyers, public employers and employees can understand. Id. Accordingly, the Court should grant certiorari in this case and overrule in whole or in part Rutan.

An alternative reason that this Court should grant certiorari in this case is to decide an important question of federal law regarding qualified immunity erroneously established by the Sixth Circuit's opinion in conflict with both Rutan and Harlow v. Fitzgerald, 457 U.S. 8090 (1982). In holding that qualified immunity protects all but the plainly incompetent or those that knowingly violate the law, the Court in Harlow explained the costs to society of litigation against government officials:

> In the context of Butz' attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. There variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry

> into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.
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> * * *
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> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

457 U.S. at 816-818 (citations omitted).

The factual and procedural distinctions between Rutan and the instant case, and the policies articulated by the Court in Harlow are such that Rutan does not justify denying Petitioners herein qualified immunity for taking the minor personnel actions at issue. Rutan was in the posture of a Rule 12(b) (6) dismissal where the plaintiffs alleged patronage personnel practices far more pervasive and having greater individual impact on the plaintiffs than is alleged in the instant case. The plaintiffs in Rutan alleged that the Governor of Illinois used a strict political patronage system to control fifty thousand state positions and five thousand job openings each year. 497 U.S. at pg. 65. The plaintiff complaining of a denial of a transfer closer to his home was complaining about a requested transfer to a different county, not a transfer across the street as in this case. Id. at 67. Moreover, that particular plaintiff in Rutan was not merely denied a transfer but also

was contemporaneously denied a promotion. Id. The "birthday party" hypothetical contained in footnote 8 of the majority's decision is mere dicta. Since the actual challenged personnel policies in Rutan were statewide, far more pervasive, and had greater impact on individuals than in this case, Rutan would not put reasonable government officials on notice that the personnel actions at issue in this case -- intra-city transfers with the same pay and rank and the denial of modest, discretionary merit pay -- violate the First Amendment.

Additionally, subsequent decisions both within the Sixth Circuit and other circuits construing Rutan could lead reasonable officials to believe that the nominal personnel actions involved in the instant case were lawful notwithstanding Rutan. E.g. Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309 (E.D. Ky. 1990) , aff' d., 1924 F.2d 1057 (table) (6th Cir. 1991); Rogers v. Miller, 57 F.3d 986, 988 (11th Cir. 1995) (deputies' transfers for political retaliation to positions with same pay and rank but which caused them personal hardship and relieved them of supervisory responsibilities not actionable); Walsh v. Ward, 991 F.2d 1334 (7th Cir. 1993) (reassignment of firefighter from engine company to training position for which he had no experience nor particular aptitude for retaliation of the exercise of First Amendment rights failed to state a claim).

Rutan was the sole case relied upon by the Sixth Circuit and the district court for denying Defendants qualified immunity. It is respectfully submitted that the Sixth Circuit has stretched the dicta from the majority opinion in Rutan beyond that intended by the majority of the Rutan Court. The Sixth Circuit's construction of Rutan would require administrators to not only remain neutral with respect to political affiliation and personnel assignments, but also to

keep a running tally of supporters and practice reverse discrimination, transferring, reassigning duties or denying merit pay only to supporters. Otherwise, under the Sixth Circuit's construction of Rutan, no experimentation or changes designed to improve the efficiency of public services to the citizens could be attempted for fear of claims of retaliation based on politics or speech. For example, the record below is undisputed that the superfluous position previously held by William Potter was abolished. Potter was transferred to an experimental position, and then to one of the most important positions in the Fire Department -- Commander of one of three firefighting shifts. Defendants' removal of Potter, the third highest ranking official in the Fire Department, from a useless position to what most firefighters would perceive to be a position of extreme importance at greatly increased pay though overtime has resulted in Defendants herein being sued individually for compensatory and punitive damages and attorneys fees.

As the district court ruled in this case, questions of motive in patronage retaliation cases are frequently held to be a question of fact for juries. Thus, without a bright line demarcation of materially adverse employment action in First Amendment claims, the policies behind Harlow of limiting the distraction of government officials performing discretionary functions from protracted litigation and potential personal liability absent genuine injury are eviscerated. The Sixth Circuit's effective elimination of any injury requirement in First Amendment claims, coupled with ever present factual disputes over motives, will require trials in nearly every patronage retaliation grievance, however petty. The ability of government employees to force supervisory officials to endless trials is contrary to this Court's holding in Harlow.

If the Court does not overrule Rutan altogether on the

merits, it should nonetheless grant certiorari and provide guidance to government officials and civil service employees regarding the application of qualified immunity in patronage retaliation claims by announcing a workable definition of materially adverse employment actions that could reasonably be understood to violate the First Amendment.

II. THE COURT SHOULD GRANT THE INSTANT PETITION FOR WRIT OF CERTIORARI BECAUSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUITS ON THE SAME IMPORTANT FEDERAL QUESTION.

The decision of the panel of the Sixth Circuit in the instant case is in conflict with the decisions of other circuits in First Amendment cases which require plaintiffs to demonstrate that they have suffered materially adverse employment action because of the exercise of First Amendment rights in order to state a claim under 42 U.S.C. §1983. E.g. Rogers v. Miller, 57 F.3d 986, 992 (11th Cir. 1995); Walsh v. Ward, 991 F.2d 1344, 1345-1346 (7th Cir. 1993); Larou v. Ridlon, 98 F.3d at 659, 662-663 (1st Cir. 1996). As explained by the Eleventh Circuit, neither Rutan nor any other case in that circuit's requisite jurisdictional pool clearly establish that patronage transfers involving no loss of pay or rank constitute adverse employment action prohibited by the First Amendment. 57 F.3d at 992. As noted by the Seventh Circuit:

> Litigation is expensive and, alas, prone to error. The farther we depart from bright line rules, the more common error becomes. Have Defendants gone "too far?" Questions of degree cannot be answered reliably,

which means that taking action is risky to a potential defendant.

> Once courts begin to use a sliding scale - posing questions that lack right, or at least obviously right answers - it becomes correspondingly important to insist before exacting damages from public officials who step over the line, that the line between the permitted and the forbidden have been marked in advance. Public officials do not receive rewards proportioned to their success, which makes management of a civil service system difficult. Employees can use their procedural and substantive rights to resist discipline or reassignment; supervisors who receive no rewards for improving the efficiency of their agencies may respond with a live and let-live approach. Little wonder that some bureaucracies become havens for slothful and inept workers. When the staff can lash back at the supervisors with actions for damages, the problem becomes worse.

Walsh, 991 F.2d at 1346. (emphasis in original).

Petitioners herein respectfully submit that the opinion of the Sixth Circuit conflicts with the construction of Rutan by the First, Seventh and Eleventh circuits. Further, the Sixth Circuit's express adoption of "the birthday party" standard from dicta in Rutan, (Opinion; App. at pg. 6a), aptly demonstrates how local government employees can now use litigation under the auspices of the venerable First Amendment as a sword against supervisors and municipal employers to prevent efficient management of civil service systems, rather than as a shield to protect employees from genuine constitutional harm. Accordingly, this Court should grant certiorari in this case and resolve the conflicting constructions of Rutan amongst the circuits.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this Court should grant the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to resolve the important questions of First Amendment and qualified immunity law presented herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 1/13/99]

No. 97-6428

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. MCGINNIS,
Plaintiffs-Appellees,

v.

BRUCE CURETON, Chief, Individually and in his Official Capacity as Fire Chief; VICTOR ASHE, Mayor, individually and in his Official Capacity as Mayor; ROBERT PRESSLEY, Individually and in his official Capacity as Deputy Fire Chief,
Defendants-Appellants,

CITY OF KNOXVILLE,
Defendant.

Before: NELSON, SURHEINRICH, and MOORE, Circuit Judges.

DAVID A. NELSON, Circuit Judge. This is an interlocutory appeal from an order denying qualified immunity to the mayor and other officials of Knoxville, Tennessee. The order was entered in a civil rights action brought against the officials and the city by five Knoxville Fire Department employees who claim to have been retaliated against for failing to support the mayor in his 1995 reelection campaign. The alleged retaliation is said to have taken the form of (among other things) job transfers, denial of consideration for discretionary pay increases and bonuses, and the withholding of a promotion.

The case turns on the question whether, as of 1995, it was clearly established that retaliatory personnel actions of the type complained of here were sufficiently "adverse" to be actionable. Upon *de novo* review we conclude, as did the district court, that this question must be answered in the affirmative. The denial of qualified immunity will be affirmed.

I.

The plaintiffs — Gary Sharpe, William Potter, Kenneth Scarbrough, Frank Potter, and William McGinnis — were employed, respectively, as Master Firefighter, Assistant Deputy Chief, Fire Officer, Administrative Deputy Chief of Firefighting, and Assistant Chief in the Knoxville Fire Department. In the mayoral election of 1995, defendant Victor Ashe, the incumbent, was challenged by Ivan Harmon, a city councilman. None of the plaintiffs supported Ashe, and

several of them actively supported Harmon.

Ashe beat Harmon, and the alleged retaliation against the plaintiffs is said to have begun almost immediately after the results of the election became known. Scarbrough, Frank Potter, and McGinnis were summarily transferred from one fire station to another. Sharpe was denied a promotion. William Potter (Frank Potter's brother) was reassigned from an administrative position to a job for which he allegedly had no experience or training and in which he was required to work substantially longer hours with no increase in take-home pay. (He also lost the use of a city-owned car.) All of the plaintiffs claim that they were denied consideration for discretionary merit raises and/or bonuses.

Asserting violations of their First Amendment rights (including rights to freedom of speech and association), together with violations of the Fifth and Fourteenth Amendments and various provisions of state and local law, the plaintiffs brought suit in federal court. The individual defendants moved for summary judgment on qualified immunity grounds. The motions were denied, and this appeal followed.

II.

To establish a retaliation claim, the plaintiffs must demonstrate the following: "(1) that the plaintiff[s] w[ere] engaged in a constitutionally protected activity; (2) that the defendant[s'] adverse action caused the plaintiff[s] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to

the exercise of the plaintiff[s'] constitutional rights." Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998).

As to element (1), it is clear that the plaintiffs' neutrality or support of Harmon had constitutional protection under the First Amendment. See Elrod v. Burns, 427 U.S. 347, 356-57 (1976). As to element (3), the defendants acknowledge that we must assume, for purposes of this appeal, that the employment actions complained of were retaliatory. The controversy centers on element (2) — whether retaliatory job transfers and the like are sufficiently "adverse" to be prohibited by the First Amendment.

In Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the Supreme Court rejected a Seventh Circuit test under which politically motivated but non-retaliatory adverse employment decisions were held to pass First Amendment muster unless they constituted an outright dismissal or the "substantial equivalent of a dismissal." The Seventh Circuit test was "unduly restrictive," in the Supreme Court's view, "because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." Id. at 75. Accordingly, the Supreme Court declared, "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Id.

Under Rutan, the allegedly retaliatory employment actions at issue in this case — transfer to unfamiliar fire

stations,[1] loss of a promotion opportunity, reassignment to a position with lower hourly pay, and the denial of consideration for merit pay raises and bonuses — are clearly adverse enough to be actionable. They are sufficiently harsh, in other words, to "press state employees ... to conform their beliefs and associations" to the selected orthodoxy. One would have to be a person of more than ordinary firmness to be willing to pay the price allegedly exacted by the Ashe administration for the privilege of declining a place on the mayor's bandwagon.

This does not end our inquiry, however. Notwithstanding that they may have violated the plaintiffs' First Amendment rights, the individual defendants would still be entitled to qualified immunity from suit if "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). The plaintiffs cannot defeat the defendants' claim of qualified immunity unless the plaintiffs' rights were "clearly established" in a relatively "particularized" sense. Id. at 640. "The contours of the right must be sufficiently clear," in other words, "that a reasonable official would understand that what he is doing violates that right." Id.

The defendants argue that they are entitled to qualified immunity, notwithstanding any violation of the plaintiffs'

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[1] We recognize that the fire department had ordered involuntary transfers in the past, but those transfers were based on staffing needs. The present transfers, we must assume at this stage of the proceedings, were retaliatory.

First Amendment rights, "because reasonable officials in defendants' respective positions could have believed their actions lawful under the specific facts and circumstances known to them." We disagree.

The "specific facts and circumstances" known to the defendants, *ex hypothesi*, included knowledge that the transfers and other adverse employment actions of which the plaintiffs complain were retaliatory in nature. Yet as early as 1982, the Seventh Circuit's Rutan panel noted, it had been held that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights." Rutan v. Republican Party of Illinois, 868 F.2d 943, 954 n.4 (7th Cir. 1989), citing Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). Rutan itself was not a retaliation case, of course, but the Supreme Court's Rutan opinion gave this endorsement to the Seventh Circuit's dictum on retaliation: "[T]he First Amendment, as the court below noted, *already* protects state employees not only from patronage dismissals but also from 'even an act of *retaliation* as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights.'" Rutan, 497 U.S. 62, 75 n.8 (emphasis supplied).

The Supreme Court's opinion in Rutan had been in the public domain for five years by the time of the acts complained of here, while our court's opinion in Bloch, 156 F.3d 673 — an opinion in which we adopted the "person of ordinary firmness test — was still three years in the future. The defendants have never given a satisfactory answer to the question of how a reasonable official could read the Supreme Court's opinion in Rutan, including footnote 8, and still

consider it constitutional to punish the plaintiffs in the manner the plaintiffs claim to have been punished for exercising their free speech rights.

Accordingly, and for substantially all of the reasons given by the district court in its memorandum opinion of November 13, 1997, the order denying the individual defendants' claim of qualified immunity is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 1/26/99]

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT EASTERN DISTRICT
OF TENNESSEE AT KNOXVILLE

No. 97-6428

GARY G. SHARPE, et al., Plaintiffs/Appellees,	)
v.	)
BRUCE CURETON, et al., Defendants/Appellants.	)

PETITION FOR PANEL REHEARING OF DEFENDANTS/APPELLANTS BRUCE CURETON, VICTOR ASHE AND ROBERT PRESSLEY

GROUNDS FOR PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR CLARIFICATION.

Defendants Bruce Cureton, Victor Ashe and Robert Pressley respectfully petition the Court for Panel Rehearing in this cause or in the alternative for correction of certain facts

contained in the Panel's Opinion which affirmed the district court's denial of qualified immunity to Defendants. It is respectfully submitted that the Panel misapprehended certain facts as set forth with particularity below, and when the corrected facts are analyzed under applicable law overlooked by the Court, the opposite result obtains.

I. FACTS MISAPPREHENDED

On page 2, first full paragraph of its Opinion, the Court correctly identified the issue in this case: "the case turns on the question of whether, as of 1995, it was clearly established that retaliatory personnel actions of the type complained of here were sufficiently 'adverse' to be actionable." (emphasis added). However, then in the second full paragraph of Section I of the Court's Opinion the Court states: "Sharpe was denied a promotion." Again on page 4 of the Opinion the Court states: "Under Rutan, the allegedly retaliatory employment actions at issue in this case -- ...loss of a promotion opportunity, ..." However, as Defendants pointed out in their main brief and reply brief, Defendants did not appeal the issue of whether the failure to promote Sharpe violated his First Amendment rights. Defendants accepted the current state of the law holding that the failure to promote constitutes a sufficiently adverse employment action to have First Amendment implications. Thus, the loss of promotion opportunities and/or denial of a promotion to Sharpe are not at issue on this appeal. Accordingly, any reference to the failure to promote Sharpe should be redacted from the Court's Opinion.

With respect to Plaintiff William Potter, the Court's factual references to the circumstances concerning his transfer

are likewise misapprehended. On page 2 second full paragraph under Section I of the Court's Opinion, the Court states: "William Potter (Frank Potter's brother) was reassigned from an administrative position to a job for which he allegedly had no experience or training and in which he was required to work substantially longer hours with no increase in take-home pay. (He also lost the use of a City-owned car)." Again on page 4 second full paragraph of the. Court's Opinion this mistaken factual scenario is repeated: "Under Rutan, the allegedly retaliatory employment actions at issue in this case -- ... reassignment to a position with lower hourly pay, ..."

A reading of the Panel's Opinion suggests that William Potter was transferred on a single occasion and which resulted in less pay. However, as the record indisputably demonstrates, William Potter was transferred once in September of 1995 to a position evaluating emergency response services, then transferred again in February, 1996 to supervise a firefighting shift. (J.A. 333; R.56: Potter I depo. pg. 21; J.A. 558-559; R.56: Armstrong Affidavit at Par. 4). There is no factual dispute that the first transfer in September of 1995 resulted in William experiencing no reduction in pay, no change in his regular hours, no change in his title or classification and no material increase in his commute. (Id.). Although William Potter lost the use of a drive-home car, the purpose for which he had that car was because he was on twenty-four hour call, seven days a week for major fire calls.(J.A. 333; R.56: Potter I depo. pg. 21). Significantly, the first transfer resulted in William being relieved of this responsibility to be on call twenty-four hours a day which is a significant, positive employment action. (J.A. 333; R.56: Potter I deposition, pg. 21; J.A. 558-559; R.56: Affidavit of

Pat Armstrong, Defendants Exh. 3, Par. 4; J.A. 332; Potter I depo. pg. 20).

With respect to William Potter's second transfer in February of 1996 to the position of Deputy Chief over a firefighting shift, this position was identical to the job William performed previously prior to his political transfer to a meaningless job in the administrative offices. (J.A. 643; R.56: William Potter depo. pg. 47; J.A. 354-356; R.56: William Potter II depo. pp. 7-8, 15; J.A. 369-373; R.56: Potter II depo. pp. 67-69, 71). There is no dispute that this unnecessary position in the administrative office was abolished when William was transferred. (J.A. 367; Potter II depo. pg. 65).

With respect to the change in pay, there is not and cannot be a factual dispute concerning this arithmetic calculation which is documented by William Potter's irrefutable pay records. (J.A. 560-561, 565; R.56: Armstrong Affidavit at Exh. 7, Pars. 7-8 and Exh. 3 thereto). It is irrefutable that: William was paid time and a half for the sixteen additional hours over a normal forty-hour week that a Deputy Chief supervising a firefighter shift works; William's transfer resulted in additional compensation to William of $21,661.00; William was paid substantially more than the two other Deputy Chiefs who performed the identical duties; and William is the third highest paid employee in the Fire Department. (Id.). William's hourly rate comparing his pay at forty hours a week and his pay at fifty-six hours a week went from $21.41 an hour to $20.52 an hour between February 1, 1996 and July 6, 1996. (J.A. 558-560; R.56: Armstrong Affidavit, Exh. 3 Par. 7). After a pay increase effective July 7, 1996, the difference in William's hourly rate

was $21.75 had he remained in administration at forty hours a week and $21.41 in firefighting. (Id.). There is no dispute that the second transfer resulted in a substantial pay increase for William Potter - $21,661.80. (Id.).

Irrespective of how the Court rules on the merits of Defendants' Petition for Panel Rehearing, it is respectfully submitted that these factual inaccuracies contained in the Court's Opinion need to be corrected.

II. POINTS OF LAW OVERLOOKED

The issue in this case is whether the specific personnel actions (once properly characterized) at issue in this case have been identified by courts from the requisite jurisdictional pool as falling within the ambit of First Amendment protection. The only case from the requisite jurisdictional pool relied upon by the Panel in its Opinion is Rutan v. Republican Party of Illinois, 497 U.S.62 (1990). Although the Court referred to the Seventh Circuit's decision in Rutan, Rutan v. Republican Party of Illinois, 868 F.2d 943 (7th Cir. 1989) and Bart v. Telford, 677 F.2d 622 (7th Cir. 1982), those cases cannot support the denial of qualified immunity in the Eastern District of Tennessee. The Seventh Circuit decision in Rutan was, of course, superceded by the Supreme Court's decision. Also, the Seventh Circuit's decision in Rutan as well as that Court's decision in Bart are not from the requisite jurisdictional pool, and, therefore, cannot govern the qualified immunity issue here.

The Supreme Court's decision in Rutan would not put reasonable persons on notice that the personnel actions at issue in this case violate the First Amendment. This is true

first because the challenged personnel policies in Rutan were far more pervasive and had greater individual impact than those in the instant case. It is true because subsequent decisions both from this circuit and other circuits could be reasonably relied upon by Defendants herein to believe that the nominal personnel actions involved in the instant case were lawful notwithstanding Rutan. E.g. Darnell v. Campbell County Fiscal Court, 924 F.2d 1057 (table) (6th Cir. 1991) (copy attached), affirming 731 F.Supp. 1309 (E.D. Ky. 1990); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 886-887 (6th Cir. 1996). Accord Rogers v. Miller, 57 F.3d 986, 988 (11th Cir. 1995) (deputies' transfers for political retaliation to positions with the same pay, and rank but which caused them personal hardship and stripped them of supervisory responsibilities not actionable).

The plaintiff in Rutan who was claiming of a denial of a transfer closer to his home was also complaining about a requested transfer to a different county, not a transfer across the street. More significantly, that plaintiff was not merely denied a transfer he allegedly was contemporaneously denied a promotion. Rutan, 49 U.S. at 67. Rutan was in the posture of a 12(b) (6) dismissal where the plaintiffs alleged that the Governor of Illinois used a strict political patronage system to control 50,000 state positions and 5,000 job openings each year. Id. pg. 65. Rutan did not concern a transfer within a relatively small city of only four persons which had no significant effect on promotions, pay, rank, benefits nor job responsibilities.

It is respectfully submitted that the Panel decision in the instant case irreconcilably conflicts with the Sixth Circuit's published decision in Kocsis, and its unpublished

decision in Darnell. Additionally, Defendants could reasonably rely upon the litany of cases from other circuits restricting Rutan's dicta which are cited by Defendants in their original brief at pages 24-32 and will not be repeated here. E.g. Walsh v. Ward, 991 F.2d 1334 (7th Cir. 1993) (reassignment of firefighter from engine company to training position for which he had no experience no particular aptitude for retaliation of the exercise of First Amendment rights failed to state a claim).

In two places in the Panel's Opinion, the Court refers to the "birthday party" example from Footnote 8 of Rutan. (Opinion, pp. 5-6). It is respectfully submitted that the adoption by this Court of the trivial "birthday party" example as the law of this circuit has unintended but extraordinarily pervasive consequences. As recognized by numerous courts, if government employees can successfully subject their supervisors to lengthy litigation and jury trials regarding virtually any aspect of the terms and conditions of their employment, then employees are in a position to bring the civil service system to its knees. See Walsh, 991 F.2d at 1346. If the instant Plaintiffs' claims which actually are at issue are actionable, then employees can insulate themselves from virtually any disfavored action by their supervisors merely by periodically supporting dark horse candidates or speaking out on unpopular issues of public concern. Unless this Court draws some line - far distant from a birthday party - that potential plaintiffs must cross to establish a sufficiently adverse employment action, the management of all state and local government civil service systems will be in the hands of the subordinate employees and the federal courts. Under this current ruling of the Court, employees have the capacity to control the entire sphere of their employment environment,

from what meals are served, who washes the dishes and who rides where on what fire truck. Civil servants will now bypass existing civil service remedies and flock to the federal courts behind attorneys seeking §1998 attorney fees regarding every employment grievance, whether significant or not. Micromanagement of state and local governments about every aspect of employment will be removed from the hands of elected and appointed officials and placed squarely in the lap of the federal courts.

It is apt to quote from the four dissenting justices in Rutan:

> The Court's opinion, of course, not only declines to confine Elrod and Branti to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, it extends those opinions beyond "constructive" dismissals - indeed, even beyond adverse treatment of current employees - to all hiring decisions. In the long run there may be cause to rejoice in that extension. When the courts are flooded with litigation under that most unmanageable of standards (Branti) brought by that most persistent and tenacious of suitors (disappointed office seekers) we may be moved to reconsider our intrusion into this entire field. In the meantime, I dissent.

Rutan, 497 U.S. at 115 (Scalia, dissenting, joined by Rheinquist, Kennedy and O'Connor). (emphasis added). It is noteworthy that the five members of the majority in Rutan are no longer on the Supreme Court, while the four dissenting

justices are still on the Court.

Without the requirement of some identifiable, quantifiable threshold of adverse employment action well beyond birthday parties, and well beyond the personnel actions actually at issue in this case, the venerable United States Constitution will be transmuted from a shield protecting government employees from genuine harm into a sword wielded against supervisors from which to secure a haven for marginal workers. See Walsh, 991 F.2d at 1346. Under the Panel's current Opinion, no supervisor can safely make any administrative changes without the threat of protracted litigation and potential personal liability.

CONCLUSION

For the foregoing reasons, Defendants/Appellants respectfully submit that the Court should modify its Opinion to correct the factual inaccuracies therein regarding the personnel actions at issue. After having done so, the Court should then reconsider the application of the law from the requisite jurisdictional pool to these facts, and reverse the judgment of the district court. In the event the Court stands by its original decision on the immunity issue, Defendants most respectfully request the Court to correct the factual mis-statements in the Opinion with respect to the non-promotion of Sharpe, which is not at issue, and the two transfers of William Potter.

Respectfully submitted,

BRUCE CURETON, VICTOR ASHE,
ROBERT PRESSLEY

By: /s/_____
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 11/13/97]

No. 3:96-cv-916

GARY G. SHARPE, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
FIRE CHIEF BRUCE CURETON, et al.,	)
Defendants.	)

ORDER

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is hereby ORDERED that the defendants' motions to dismiss or for summary, judgment [docs. 40, 43, and 45] on the following issues are DENIED:

I. Whether the alleged adverse employment actions need be substantial;

II. Whether the plaintiffs' transfer claims were timely filed;

III. Whether the plaintiffs have stated claims related to the denial of merit raises and bonuses;

IV. Whether causation is a jury question; and

V. Whether the defendants are entitled to qualified immunity.

The remaining issues raised in the defendants' motions to dismiss or for summary judgment will be considered in a separate Memorandum and Order.

It is further ORDERED that the plaintiffs' motion for permission to file a response to the defendants' reply or for oral argument on the defendants' motions [doc. 116] is GRANTED IN PART AND DENIED IN PART. Oral argument on the defendants' motions was heard on October 24, 1997, but the court denies the plaintiffs' motion for permission to file a response to the defendants' reply.

ENTER:

/s/_____
Leon Jordan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 11/13/97]

No. 3:96-cv-916

GARY G. SHARPE, et al., Plaintiffs,	)
v.	)
FIRE CHIEF BRUCE CURETON, et al., Defendants.	)

MEMORANDUM OPINION

This civil rights case is before the court on the all the defendants' motions to dismiss or for summary judgment. The motion related to plaintiffs Scarbrough, Frank Potter, and McGinnis is found at docs. 40 and 42 (exhibits at doc. 41); the motion related to plaintiff Sharpe is found at docs. 43 and 44 (exhibits attached to doc. 44); and the motion related to plaintiff William Potter is found at docs. 45 and 56 (exhibits at doc. 46). The plaintiff has filed a consolidated response at doc. 94 with attached exhibits. The defendants have filed a consolidated reply at doc. 113 (exhibits at doc. 114). Finally, the plaintiffs have filed a motion for permission to file a response to the defendants' reply or for oral argument on the defendants' motions [doc. 116]. Oral argument was heard on October 24, 1997, and thus, the motions are ripe for the court's consideration.

In their complaint, each of the plaintiffs, all employed as firefighters with the City of Knoxville, allege that the defendants violated their First, Fifth, and Fourteenth Amendment rights to speech and association by taking adverse employment actions against them after they either supported defendant Ashe's opponent in the 1995 Knoxville mayoral race or merely did not support defendant Ashe. The plaintiffs allege that the defendants violated 42 U.S.C. § 1983, the City of Knoxville Charter § 1012, the City of Knoxville Administrative Rules 1 § 1.09, and the Civil Service Merit Board Rules §§ 401 and 2102. A summary of the plaintiffs' claims is as follows:

A. Kenneth F. Scarbrough claims that he actively supported defendant Ashe's opponent, Ivan Harmon, in the 1995 mayoral race. Scarbrough alleges that on election night, after Ashe had won another term as Mayor of the City of Knoxville, Scarbrough was told that he was being transferred, effective the next day, to a fire station in South Knoxville from North Knoxville where he had lived and worked for twenty-eight years. Scarbrough further alleges that thereafter he was twice denied a merit (step) raise or a bonus because of his political support of Ivan Harmon and because he filed this lawsuit.

B. Frank Potter, claims that he also actively supported Ivan Harmon for mayor. He alleges that on the eve of the election, he was notified that he was being transferred from his fire station in North Knoxville to West Knoxville because of that support. Frank Potter also claims that he was twice denied merit (step) raises and bonuses because of his political support of Ivan Harmon and because he filed this lawsuit.

C. William McGinnis did not support either candidate for mayor. He alleges that he was told on election eve that he was being transferred to another fire station. He claims that his lack of support for defendant Ashe was the reason for his transfer. He also alleges that twice he did not receive merit (step) raises or bonuses because he did not support Ashe and because he filed this lawsuit, and he lost pay because he was transferred in the middle of a pay cycle. Finally, he alleges that defendant Ashe refused to consider a reasonable request regarding modification of his pension in retaliation for asserting his fights in this lawsuit.[2]

D. William Potter (brother of Frank Potter) was the third ranking member of the fire department at the time of the transfers. He actively supported Ivan Harmon in the mayoral race. He alleges that because of this support, the day after the election he was relieved of his duties in the administrative office and assigned an office in a supply closet. He alleges that he lost his use of City vehicle and he was assigned to respond to emergency medical First Responder calls even though he had no experience or training for such a position. Thereafter, William Potter claims that he was transferred to a position as Shift Chief, and his work week increased from forty hours per week to fifty-six hours per week with no additional compensation for the extra time. He says also that he does not receive overtime compensation as required by the Fair Labor Standards Act. William Potter further claims that he was twice denied merit (step) raises or

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[2] This claim purportedly applies to all the plaintiffs, but McGinnis appears to be the only participant in the pension plan in question.

bonuses because of his support of Ivan Harmon and because he filed this lawsuit.

E. Gary Sharpe alleges that he was denied a promotion because of his support of Ivan Harmon in the 1995 mayoral race. He claims that he scored the sixth highest score (out of thirty-nine test takers) on the Civil Service Exam for promotion to Fire Officer, but he did not receive one of the twenty-five promotions. Sharpe also alleges that twice he was denied merit (step) raises and bonuses because of his support of Ivan Harmon and because he filed this lawsuit.

In their motions to dismiss or for summary judgment, the defendants raise numerous arguments pertaining to each plaintiff and defendant. Five of these arguments are discussed below as they apply to each plaintiff and defendant. The remaining arguments will be addressed in a separate Memorandum and Order. Before discussing the defendants' arguments, however, a brief discussion of the standards this court must apply to dispositive motions is necessary.

The purpose of a motion to dismiss the complaint brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is to "test the formal sufficiency of the claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case." Wright and Miller, 5A Federal Practice and Procedure § 1356. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The court must assume that the allegations in the complaint are tree, drawing all inferences in

favor of the plaintiff. See Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment may be granted, "if the pleadings, depositions, answers to interrogatories and admissions of file, together with affidavits, if any, showy that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Sixth Circuit has expressly adopted a trilogy of United States Supreme Court cases which clarified the standards for summary judgment under Rule 56. See Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989) (adopting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). In summary, these cases hold that in order for a non-moving party to defeat a motion for summary judgment, the non-moving party must come forward with persuasive evidence to support his or her claim that there is a genuine factual dispute; that is, the non-moving party must produce evidence on which the jury could reasonably find for the non-moving party. "The 'mere possibility' of a factual dispute is not enough." Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992) (quoting Gregg v. Allen-Bradley Co., 801 F.2d 859, 863 (6th Cir. 1986)).

I. Whether the alleged adverse employment actions need be substantial

The defendants argue that ail the plaintiffs have failed

to state a claim for a constitutional violation because the alleged actions taken against them were insubstantial.[3] The defendants argue that the courts of appeals have found that a federal court is not the appropriate forum to challenge minor employment grievances. They argue that the adverse employment actions allegedly suffered by the plaintiffs in this case are minimal inconveniences, and this court should not undertake to "micromanage" Knoxville's Fire Department.

It is undisputed that plaintiffs Scarbrough, Frank Potter and McGinnis were all transferred on election night to different fire halls with no change in rank, duties or pay. Plaintiff William Potter was transferred the day after the election from administrative duties to an office in a supply closet to do a job that was created the day after the election and for which he was not qualified or trained, and then was transferred to Shift Officer where he alleges that he had to work more hours for the same pay. All the plaintiffs, including plaintiff Sharpe, were denied merit (step) raises and bonuses in 1996 and 1997.

The United States Supreme Court consistently has recognized that "political belief and association constitute the core of those activities protected by the First Amendment." Elrod v. Burns, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976). In Elrod, the plaintiffs, non-civil service employees of the sheriff's office, were either discharged or threatened with discharge solely because of their affiliation or

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[3] As to plaintiff Sharpe, the defendants make this argument only as to his claim related to merit (step) raises and bonuses.

non-affiliation with the newly elected sheriff's political party. Justice Brennan, writing the plurality opinion, discussed the practice of political patronage and its restraints on freedoms of belief and expression, and held that political patronage dismissals were unconstitutional under the First and Fourteenth Amendments. Id. at 373, 96 S.Ct. at 2689. The Court used an "exacting scrutiny" standard to determine if the political patronage practices in Elrod significantly impaired the plaintiffs' First Amendment rights. Id. at 362, 96 S.Ct. at 2684. The Court recognized that even though a public employee may not have a right to a particular employment benefit, and may be denied that benefit for multiple reasons, the benefit cannot be denied for an unconstitutional reason. Id. at 361-62, 96 S.Ct. at 2683.

In 1990, the United States Supreme Court considered whether First Amendment protections extended to promotion, transfer, recall, or hiring decisions for which party, affiliation was not a requirement. Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). The Seventh Circuit Court of Appeals had held that, while discharging an employee on the basis of their political affiliation is prohibited, other employment practices must be the "substantial equivalent of a dismissal" in order to be prohibited. The Supreme Court found that just because employment decisions are not punitive does not mean that they do not have a "chilling" effect on the plaintiffs' First Amendment right to associate with the political party/candidate of their choice. Id. at 73-74, 110 S.Ct. at 2736. The Court held that decisions about "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Id. at 75, 110 S.Ct.

at 2737. The Court specifically rejected the Seventh Circuit's "substantial equivalent of dismissal" test as being "unduly restrictive", recognizing that there are employment deprivations less harsh than dismissal that "nevertheless press state employees and applicants to conform their beliefs and associations" to the prevailing political authority. Id.

This court finds that the argument raised by the defendants in this case is exactly the argument raised before the Supreme Court in Rutan. Each of the plaintiffs in this case allege that they suffered a punitive employment action -- transfer, failure to promote, and failure to award merit (step) raises and bonuses. Whether these employment actions had a "chilling" effect on the plaintiffs' political activities and were the direct result of the plaintiffs' political activity or lack of political activity is for the jury to decide.

The defendants have cited several cases in support of their argument that the adverse employment action must be more than minimal to state a claim for violations of their First and Fourteenth Amendment rights. These cases are, for the most part, easily distinguishable from the case before this court. The only Sixth Circuit opinion relied upon by the defendants for this argument is Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309 (E.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (Table) (6th Cir. 1991). The plaintiff claimed that she was unlawfully discharged from her position as a secretary because of her age and sex. The plaintiff's position was abolished and she was offered a reassignment to another office, which she declined because the new position was slightly further from her home. The district court held that the reassignment must be the equivalent to a dismissal to be a constitutional violation. The Sixth Circuit affirmed the district

court's decision, but went further in examining the nature of the new position to determine if it was tolerable. The Sixth Circuit found that there was nothing adverse about the new position except that it was slightly further away from the plaintiff's home. This case offers little guidance in the matter before this court. Darnell was an age and sex discrimination case and the plaintiff had a burden to make out a *prima facie* case of discrimination by showing that she suffered from an adverse employment action. It was not a political patronage case implicating First Amendment rights. Further, both the district court and the Sixth Circuit pointed out that a transfer involving a loss of prestige or an objectively demeaning change in conditions of employment can be a constructive discharge, and thus, an adverse employment decision.

Likewise, in Crady v. Liberty National Bank & Trust Company, 993 F.2d 132 (7th Cir. 1993), the Seventh Circuit held that the plaintiff failed to make out a *prima facie* case of age discrimination because he could not show that his transfer was an adverse employment action.

The issue before the court in DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995), was one of qualified immunity. The plaintiff was a zoning inspector who, at a public meeting, criticized the proposed settlement of a zoning matter. The plaintiff's supervisor reprimanded him for this speech. Thereafter, the zoning districts were redrawn, and the plaintiff was reassigned to a new district. The plaintiff suffered no change in his salary or benefits, nor did he lose any perquisites of his position. Id. at 794. First, the Fourth Circuit found that it was not certain that the plaintiff's speech was a matter of public concern, and even if it was, a reprimand and reassignment were less severe employment

actions than those discussed in Rutan. DiMeglio, at 806-07. Therefore, the Fourth Circuit held that it was not clearly established in 1990, the year Rutan was decided, that a reprimand and reassignment were deprivations of valuable government benefits. DiMeglio, at 807. Again, this case offers little guidance given that the issue before the Fourth Circuit were qualified immunity and the status of the law concerning political patronage in 1990. As will be discussed in Part V of this Memorandum and Order, this court finds that it was clearly established in 1995 that it was a violation of the plaintiffs' rights to punish them for their non-support of defendant Ashe, and thus, the defendants are not entitled to qualified immunity.

Finally, the defendants rely on two Fifth Circuit cases involving alleged adverse employment actions taken in a university setting. The defendants rely on Harrington v. Harris, 108 F.3d 598, 604 (52 Cir. 1997), however, the opinion cited was withdrawn and an opinion found at Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997), has been substituted for the original opinion. The three plaintiffs in Harrington were tenured law professors at Texas Southern University, a predominately black school. The plaintiffs criticized the recommendation that non-black students be appointed to representative positions on various law school committees. The plaintiffs, among other professors, also openly criticized the dean of the law school alleging that he discriminated against certain professors as to salaries, failed to adhere to law school policies, and mishandled his administrative duties. The plaintiffs also participated in a "no confidence" vote concerning the dean. In their complaint, the plaintiffs allege that they were denied merit pay increases because they exercised their right of free speech. The Fifth

Circuit assumed without deciding that the plaintiffs' speech was a matter of public concern and went on to consider whether the plaintiffs suffered an adverse employment action taken in retaliation for their exercise of free speech. The court concluded that the dean's criticism of one of the plaintiffs was not an adverse employment action. 115 F.3d at 366. The Fifth Circuit found that all the plaintiffs had received merit increases, so their complaint was that they did not receive as much as they thought they deserved. The Fifth Circuit stated: "If Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion." Id. The court found that the variations in the pay increases were so insubstantial that they could not be considered adverse employment actions. Id. Thus, the substituted opinion does not support the defendants' argument that the denial of merit raises and bonuses is an insubstantial employment action and not deserving of First Amendment protection.

The defendants also rely on an earlier Fifth Circuit case, Dorsett v. Board of Trustees for State Colleges & Univ., 940 F.2d 121 (5th Cir. 1991). In Dorsett, the Fifth Circuit did not even consider Rutan in deciding that the alleged retaliatory actions taken against the plaintiff for his speech -- denial of summer employment and salary increases and other miscellaneous harassments -- did not rise to the level of constitutional deprivations. Dorsett, at 123. The court specifically held that disputes arising in a university setting over assignments, pay increases, and other administrative matters are "relatively trivial," and the federal courts are not a appropriate forum to settle these disputes. Id. The Fifth

Circuit also found that the plaintiff's speech was not of public concern and held that he had not stated a claim for relief for violations of his First Amendment rights. Id. at 125. To the extent that Dorsett would limit the expansive language of Rutan concerning employment actions that have the potential to chill a person's exercise of their First Amendment rights, this court declines to follow it. Further, the Fifth Circuit specifically limited the scope of Dorsett by confining the holding to the university setting.

There does not appear to be any case in the Sixth Circuit interpreting Rutan to mean anything other than what it says; that is, that employment actions such as transfers and denials of bonus/merit pay increases are adverse employment actions because they can have a chilling effect on a public employee's choice of political association. The court finds that this issue does not have merit, and all the defendants' motions for summary judgment on this issue must be denied as to all plaintiffs.

II. Whether the plaintiffs' transfer claims were timely filed

The defendants argue that the transferred plaintiffs (all except Sharpe) did not bring their lawsuit within the applicable one-year statute of limitations. See Dunn v. State of Tennessee, 697 F.2d 121,126 (6th Cir.), *cert. denied,* 460 U.S. 1086 (1983) (section 1983 claims brought in Tennessee are governed by a one-year statute of limitations). Plaintiffs Scarbrough, Frank Potter, McGinnis, and William Potter were transferred on or about September 26-27, 1995, but the lawsuit was not filed until October 24, 1996. The defendants argue that the limitations period begins to run from the time

of the alleged discriminatory action. In this case, the defendants argue, the alleged discriminatory actions occurred on September 26-27, 1995, so that is when the limitations period began. The defendants also contend that the "continuing violation" theory does not apply to this case.

In response to this argument, the plaintiffs make two arguments: (1) the defendants should not be allowed to assert a statute of limitations defense because they reneged on a settlement agreement at the last moment to the plaintiffs' detriment; and (2) there were continuing violations of the plaintiffs' constitutional rights (*e.g.*, the denial of merit raises and bonuses) that occurred within one year of the filing of the lawsuit. In order to reach the first issue, however, it appears that the court will have to consider the affidavit of the plaintiffs' counsel concerning the negotiations for the alleged settlement of the plaintiffs' claims. If this affidavit is considered, the defendants argue that the plaintiffs' counsel becomes a witness and must be disqualified (*see* Defendants' motion to disqualify plaintiffs' counsel, doc. 98).

The court is of the opinion, however, that it is unnecessary to decide the first issue, because the plaintiffs' second argument saves their transfer claims. The Sixth Circuit has recognized the "continuing violation" defense to a statute of limitations argument. See Hull v. Cuyahoga Valley Board of Educ., 926 F.2d 505 (6th Cir.), *cert. denied,* 501 U.S. 1261 (1991). In Hull, the Sixth Circuit, relying on earlier Sixth Circuit and Supreme Court cases, stated that where a plaintiff's claims are based on more than one isolated incident, but rather on a number of incidents, at least one of which occurred within the limitations period, then the complaint is timely. Id. at 510. In another Sixth Circuit case,

the court found that the test was whether there was an "over-arching policy of discrimination." Dixon v. Anderson, 928 F.2d 212 (6th Cir. 1991). There must be at least one discriminatory act within the limitations period measured back from the time of the complaint. Hull, at 511.

In Hull, the Sixth Circuit relied on the United States Supreme Court case, Haven Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). In Haven Realty, the plaintiffs alleged that the defendant engaged in acts of "racial steering." There were five separate instances alleged, four of which occurred outside the 180-day limitations period for bringing suit under the Fair Housing Act. The Court held that the claims were not based on each isolated claim, but on a pattern of continuing violation. Id. at 380-81,102 S.Ct. at 1125. As long as one act occurred within the 180-day limitations period, then the complaint was timely. Id.

The defendants argue that there is a type of "discovery" rule attached to the continuing violations theory; that is, the limitations period begins to run as soon as the plaintiff has been alerted that his or her rights have been violated. The defendants interpret the court's ruling in Hull to say that a plaintiff can only claim a continuing violation when the defendant's earlier acts were not known to be discriminatory, and, only after a period of time, all the defendant's acts, added together, cause the plaintiff to be aware of the nature of the discrimination. Given the facts of the Haven case upon which the Sixth Circuit relied in deciding Hull, the court finds that this is not a correct formulation of the continuing violation theory. In Haven, it was clear that the defendant was discriminating against the plaintiffs from the

very first incident of racial steering. As long as the acts are related; that is, part of the same discriminatory pattern, and one act occurs within the limitations period, then there has been a continuing violation.

Applying the continuing violation theory, to the facts before this court, the court finds that the plaintiffs have pleaded acts of discrimination sufficient to allege a continuing violation of their constitutional rights. In addition to the plaintiffs' allegations of unlawful transfers, they have also alleged a denial of merit (step) raises and bonuses because of their political affiliation in violation of their constitutional fights in December 1995 and December 1996. These acts occurred within the one-year limitations period. In the court's opinion, the denial of merit (step) raises and bonuses are sufficiently related to the allegations regarding the transfers of the plaintiffs so that the plaintiffs may rely on the continuing violation theory to avoid the defendants' statute of limitations defense.

Without considering in any way whether the plaintiff's estoppel argument is valid, the court finds that the defendants' motion on the statute of limitations must be denied.

III. Whether the plaintiffs have stated claims related to the denial of merit raises and bonuses

The defendants next argue that the December 1996 denials of merit (step) raises and bonuses for 1997, and the mayor's refusal to support McGinnis' request related to a modification of the pension plan, allegedly done in retaliation for filing this lawsuit, do not state a claim for First Amendment violations because these are personnel grievances

and not matters of public concern to be afforded First Amendment protection.

The plaintiffs argue that the defendants have missed the point. The plaintiffs say that it was because they exercised their rights under the First Amendment and supported Harmon for mayor, and then filed a lawsuit, that the City, through its agents, took these adverse employment actions against them. In fact, the plaintiffs submit, defendant Cureton told all the plaintiffs that they would not be considered for bonus/merit pay in 1997 because they filed this lawsuit. The plaintiffs say that this is clearly retaliation.

The defendants argue that the plaintiffs' grievances are not matters of public concern. This is true, but, the mayor's election and these persons fight to support whomever they please is a matter of public concern, and this is the issue, not the grievances which arose out of the defendants' actions. The alleged retaliation clearly relates back to the protected political activity.

There is a two-step process to determine if the plaintiffs were transferred for exercising their First Amendment rights. First, it must determined whether the plaintiffs' speech or activities were a matter of public concern. See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977). The Sixth Circuit has stated that a mayor's election is a matter of public concern. Hartsel v. Keys, 87 F.3d 795, 803, n. 7 (6th Cir. 1996), *cert denied,* 117 S.Ct. 683 (1997) ("a mayor's election campaign is a matter of public concern"). If so, then the trier of fact must determine if the exercise of the First Amendment rights was a substantial

or motivating factor in the adverse employment actions. Doyle, at 285, 97 S.Ct. at 575; Hartsel, at 803.

The court finds that whether the plaintiffs' actions were a substantial or motivating factor in the alleged adverse employment actions is a question for the trier of fact. The defendants' motion on this issue as to all plaintiffs must be denied.

IV. Whether causation is a jury question

The individual defendants argue that although it is usually a jury question as to whether the plaintiffs' actions were a substantial or motivating cause of the alleged adverse employment actions, in this case, there is no proof that:

a) Cureton or Pressley caused Frank Potter's transfer;

b) Cureton or Pressley did anything more than report Scarbrough's political activity to the mayor who made the transfer decision;

c) Ashe had any input into the decision to transfer McGinnis (who was transferred so Ashe could cause Frank Potter to be transferred) or that Pressley did anything more than relay the decision to McGinnis;

d) Ashe had any input into the denial of merit raises and bonuses;

e) Pressley participated in the decisions concerning the merit raises and bonuses;

f) Ashe, Cureton, or Pressley had any control over McGinnis' pension plan request;

g) William Potter's transfer was anything more than a staffing decision; and

h) the denial of Sharpe's promotion was because of his limited support of Harmon.

In response, the plaintiffs say that there is both direct and circumstantial evidence related to the issue of causation as to each plaintiff and defendant. The plaintiffs submit that defendant Ashe admitted his reasons for transferring Scarbrough, Frank Potter, McGinnis, and William Potter and these reasons were motivated by these plaintiffs' political affiliations. Further, the plaintiffs say that Cureton admitted that he knew the mayor's reasons and cooperated in arranging the transfers. And the plaintiffs say that Pressley carried out the transfers even though he knew that they were not "regular" transfers, and in fact, lied to the plaintiffs about the reasons for the transfers. As to plaintiff Sharpe, Cureton and Pressley were both directly involved in the promotion decisions of the Fire Department. Although defendant Ashe denies having any direct input into the decisions that affected Sharpe's promotion, if the plaintiffs can show by circumstantial evidence that the promotions were made based on the political affiliations of the applicants, and that defendant Ashe had any say in that policy, then a jury could reasonably find defendant Ashe liable to the plaintiffs. Finally, by their deposition testimony, both Cureton and Pressley admit that they were involved in the merit raises and bonuses decisions. Like the promotion decisions, if the plaintiffs can show by circumstantial evidence or otherwise

that defendant Ashe used the merit raises and bonuses as political rewards, then he, too, could be liable to the plaintiffs.

The court finds that the issues of causation must go to a jury. There is sufficient direct and circumstantial evidence, viewed in the light most favorable to the plaintiffs as the non-moving parties, to raise genuine issues of material fact on the issue of causation.

V. Whether the defendants are entitled to qualified immunity

The individual defendants claim that they are entitled to qualified immunity because it was not clearly established in 1994 that transferring the plaintiffs and denying them merit raises and bonuses because of their political affiliations constituted adverse employment actions. In order to defeat a claim of qualified immunity, the plaintiffs must show that the' defendants knew or reasonably should have known that the actions they took acting within the scope of their employment would violate the plaintiffs' constitutional rights. See Wood v. Strickland, 420 U.S. 308,322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975). If the official's actions are "objectively reasonable" in light of clearly established law", then the official is entitled to qualified immunity. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Thus, the standard that applies in this case is: The individual defendants are entitled to qualified immunity and thus, summary judgment, if, in light of clearly established principles governing First Amendment political patronage cases, they could, as a matter of law, reasonably have believed that their election eve transfers of the plaintiffs,

denial of promotions, and denials of merit (step) raises and bonuses were lawful. See, e.g., Anderson v. Creighton, 483 U.S. 635,641,107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987); see also Manuel v. Ohio Dep 't of Health, 810 F. Supp. 928, 930 (S.D. Ohio 1992). The term "clearly established" does not require that the exact action in question to have been decided, but it means that "in light of preexisting law the unlawfulness must be apparent." Anderson, at 640, 107 S.Ct. at 3039.

The actions involving the plaintiffs in this case occurred in 1995, over five years after the Supreme Court decided Rutan. As discussed above in Part I of this Memorandum Opinion, the Supreme Court held in Rutan that transfers and denials of promotions, among other types of punitive employment actions, if ordered because of employees' political affiliation or lack thereof, were violations of the employees' First Amendment rights. This court can find no difference between the transfers and denial of promotions prohibited in Rutan and the transfers and denial of promotions that occurred in this case.

The only question remaining, then, is whether it was clearly established that a public employer could not, constitutionally, predicate merit raises and bonuses on the political loyalty of its employees. Neither party has presented the court with any specific case law on this issue. The court finds that it is not necessary, however, for the parties to have cited the court to a case that holds that this particular employment action is illegal. In McCloud v. Testa, 97 F.3d 1536, 1556 (6th Cir. 1996), the Sixth Circuit rejected the notion that there must be "specific precedent" related to whether a particular employee's position was subject to

patronage dismissal, and found instead that the lack of such precedent is not a "sufficient condition for concluding that the law is unclear on the subject and so qualified immunity must be granted to a defendant." Id at 1556. In a footnote, the Sixth Circuit recognized that, "The Rutan Court extended Elrod/Branti to apply to *all adverse employment actions,* not simply terminations." McCloud, at 1554, n. 24.

The court finds that the broad language of Rutan, to the effect that employment actions that have the potential to "chill" an employee's political beliefs and associations are prohibited actions under the First Amendment, was sufficiently clear to put the defendants on notice that they could not deny the plaintiffs merit raises and bonuses because of their political affiliations.

Therefore, the defendants motion for summary judgment on the issue of qualified immunity is denied.

Conclusion

Therefore, for the reasons stated above, the court finds that the defendants' motions to dismiss or for summary judgment on the issues discussed must be denied. An order to this effect shall be entered.

ENTER:

/s/_____
Leon Jordan
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 5/23/97]

No. 3:96-CV-916

GARY G. SHARPE, et al., Plaintiffs,	)
v.	)
BRUCE CURETON, et al., Defendants.	)

DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT WITH RESPECT TO CLAIMS OF KENNETH F. SCARBROUGH, FRANK E. POTTER AND WILLIAM H. MCGINNIS

The Defendants Bruce Cureton, Victor Ashe, Robert Pressley and City of Knoxville appear, and respectfully move the Court, pursuant to Federal Rules of Civil Procedure 12(b) 6 and/or 56, to dismiss Plaintiffs Scarbrough, Potter and McGinnis' Complaint and First Amended Complaint for failure to state a claim upon which relief can be granted or in

the alternative for summary judgment on grounds no genuine issue of material fact exists that:

1. Plaintiffs' claim that: they were transferred from one fire station within the City of Knoxville to another fire station within the City without any change in their pay, rank, title, job status or duties; they were subsequently passed over for discretionary bonus or merit pay (step) increases; and McGinnis' claim that Ashe refused to consider a pension modification request fail to allege sufficiently adverse employment action to sustain a claim of retaliation in violation of Plaintiffs' First Amendment rights.

2. Plaintiffs' claim that they were transferred from one fire station to another in September of 1995 are barred by the applicable one year of statute of limitations.

3. Plaintiffs' claim in their First Amended Complaint that the denial of merit/bonus pay or pension modifications was in retaliation for filing the instant lawsuit is not actionable as a First Amendment violation because Plaintiffs' suit concerning their private, personnel grievances does not constitute First Amendment protected activity.

4. Plaintiffs Scarbrough and Frank Potter cannot establish with respect to Defendants Cureton and Pressley proximate causation regarding their transfer; Plaintiff McGinnis cannot establish proximate causation regarding his transfer or pension modification request as to all Defendants; and none of the Plaintiffs can establish proximate causation regarding their claim of denials of bonuses or pay steps with respect to Defendants Pressley and Ashe.

5. Plaintiffs' claim under 42 U.S.C. §1985(3) fails to state a claim upon which relief can be granted since employees of a municipal corporation acting in the course and scope of their employment cannot as a matter of law form an intra-corporate conspiracy.

6. Reasonable officials in the respective Defendants' positions could have believed their actions lawful under the specific facts and circumstances of this case, and accordingly they are entitled to qualified immunity to Plaintiffs' action for damages.

7. No custom, policy or practice of the City of Knoxville was the moving force behind any alleged violation of Plaintiffs' constitutional rights.

Accordingly, Defendants submit that they are entitled to judgment as a matter of law. In support thereof, Defendants submit the accompanying memorandum and exhibits to their Motion.

Respectfully submitted,

BRUCE CURETON, VICTOR ASHE, ROBERT PRESSLEY AND CITY OF KNOXVILLE

By: /s/_____
ROBERT H. WATSON, JR.

By: /s/_____
JOHN T. BATSON, JR.

By: /s/_____
JOHN C. DUFFY

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 5/23/97]

No. 3:96-CV-916

GARY G. SHARPE, et al., Plaintiffs,	)
v.	)
BRUCE CURETON, et al., Defendants.	)

DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT WITH RESPECT TO CLAIM OF WILLIAM G. POTTER

The Defendants Bruce Cureton, Victor Ashe, Robert Pressley and City of Knoxville appear, and respectfully move the Court, pursuant to Federal Rules of Civil Procedure 12(b) 6 and/or 56, to dismiss Plaintiff William Potter's Complaint and First Amended Complaint for failure to state a claim upon which relief can be granted or in the alternative for summary judgment on grounds no genuine issue of material fact exists that:

1. William Potter's claims that he was transferred from "Administrative Deputy Chief of Firefighting" to other

Deputy Chief positions with the same rank and classification; that he was subsequently passed over for discretionary bonus or merit pay (step) increases; and that Ashe refused to consider a pension modification request all fail to allege sufficiently adverse employment actions to sustain a claim of retaliation in violation of Plaintiff's First Amendment rights.

2. William Potter's claim that he was transferred from the position of "Administrative Deputy Chief of Firefighting" to a position with the same rank and classification evaluating firefighting and emergency responses in September of 1995 is barred by the applicable one year statute of limitations.

3. William Potter's claim in his First Amendment Complaint he was denied merit/bonus pay or pension modifications in retaliation for filing the instant lawsuit is not actionable as a First Amendment violation because Plaintiff's suit concerning his private, personnel grievances does not constitute First Amendment protected activity.

4. William Potter cannot establish that his exercise of First Amendment Protected Activity was a substantial or motivating factor in his transfers, failure to receive a bonus or pay step increase or pension plan modification request and/or that the individual Defendants proximately cause the complained of personnel actions.

5. William Potter's claim under 42 U.S.C. §1985(3) fails to state a claim upon which relief can be granted since employees of a municipal corporation acting in the course and scope of their employment cannot as a matter of law form an intra-corporate conspiracy.

6. William Potter's compensation is above and beyond compliance with the requirements of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. and the Portal to Portal Act, 29 U.S.C. §259.

7. Reasonable officials in the respective Defendants' positions could have believed their actions lawful under the specific facts and circumstances of this case, and accordingly they are entitled to qualified immunity to Plaintiff William Potter's action for damages.

8. No custom, policy or practice of the City of Knoxville was the moving force behind any alleged violation of William Potter's constitutional rights.

Accordingly, Defendants submit that they are entitled to judgment as a matter of law. In support thereof, Defendants submit the accompanying memorandum and exhibits to their Motion and incorporate herein by reference the discussion of applicable case law submitted May 23, 1997 in the memorandum with respect to the claims of Plaintiffs Scarbrough, Frank Potter and McGinnis.

Respectfully submitted,

BRUCE CURETON, VICTOR ASHE, ROBERT PRESSLEY AND CITY OF KNOXVILLE

By: /s/_____
ROBERT H. WATSON, JR.

By: /s/_____

JOHN T. BATSON, JR.

By: /s/_____
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

[Filed 5/30/97]

No. 3:96-CV-916

GARY G. SHARPE, et al., Plaintiffs,	)
v.	)
BRUCE CURETON, et al., Defendants.	)

DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT WITH RESPECT TO CLAIM OF GARY G. SHARPE

The Defendants Bruce Cureton, Victor Ashe, Robert Pressley and City of Knoxville appear, and respectfully move the Court, pursuant to Federal Rules of Civil Procedure 12(b)6 and/or 56, to dismiss Plaintiff Gary Sharpe's Complaint and First Amended Complaint for failure to state a claim upon which relief can be granted or in the alternative for summary judgment on grounds no genuine issue of material fact exists that:

1. With respect to Plaintiff Sharpe's claim that he was passed over for a promotion in February, 1996, Sharpe

cannot show that his limited support of candidate Ivan Harmon was a substantial or motivating factor proximately causing Cureton initially to decide to promote other candidates over Sharpe;

2. Plaintiff's claim that he was subsequently passed over for discretionary bonus or merit pay (step) increase fails to allege sufficiently adverse employment action to sustain a claim of retaliation in violation of Plaintiff's First Amendment rights.

3. Plaintiff's claim in his First Amended Complaint that the denial of merit/bonus pay in 1996 and 1997 was in retaliation for filing the instant lawsuit is not actionable as a First Amendment violation because Plaintiff's suit concerning his private, personnel grievances does not constitute First Amendment protected activity.

4. Plaintiff's claim under 42 U.S.C. §1985(3) fails to state a claim upon which relief can be granted since employees of a municipal corporation acting in the course and scope of their employment cannot as a matter of law form an intra-corporate conspiracy.

5. Reasonable officials in the respective Defendants' positions could have believed their actions lawful under the specific facts and circumstances of this case, and accordingly they are entitled to qualified immunity to Plaintiff Sharpe's action for damages.

6. No custom, policy or practice of the City of Knoxville was the moving force behind any alleged violation of Sharpe's rights.

Accordingly Defendants submit that they are entitled to judgment as a matter of law. In support thereof, Defendants submit the accompanying memorandum and exhibits to their Motion and incorporate herein by reference the discussion of applicable case law submitted May 23, 1997 in the memorandum with respect to the claims of Plaintiffs Scarbrough, Frank Potter and McGinnis.

Respectfully submitted,

BRUCE CURETON, VICTOR ASHE, ROBERT PRESSLEY AND CITY OF KNOXVILLE

By: /s/_____
ROBERT H. WATSON, JR.

By: /s/_____
JOHN T. BATSON, JR.

By: /s/_____
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EXHIBIT

THE CHARTER

* * *

ARTICLE X. PERSONNEL SYSTEM AND CIVIL SERVICE

1001. Policy.

A personnel system shall be established that will assure utilization of human resources in a manner designed to maximize efficient and effective performance in providing appropriate service to the citizens of Knoxville and equitable treatment of city employees. Personnel actions, including, but not limited to, appointment, promotion and retention shall be made on the basis of merit and fitness alone without regard to any political test, qualification, affiliation, association or opinion, except as otherwise provided in this charter. All personnel action shall be taken on a nondiscriminatory basis consistent with general law.

* * *

1003. Civil service merit board.

(A) *Creation.* A civil service merit board, composed of five (5) members who are committed to merit system principles, is created.

(b) *Appointment, tenure, vacancies, qualifications and removal:*

(1) Members of the board shall be nominated by the board and shall be confirmed by a majority vote of the council. In the event there are no board members serving to make the appointments, the mayor shall make appointments to the board which shall be subject to the confirmation by a majority vote of the council. Each member shall be appointed for a term of five (5) years. No member shall serve more than two (2) consecutive terms.

* * *

(F) *Powers and duties*. The powers and duties of the civil service merit board shall be as follows:

(1) To represent the public interest with regard to merit system principles in the management and administration of the personnel systems of the city.

(2) To have responsibility for the recruitment, examination, certification and protection of employees as may be more fully set out below.

(3) To advise the mayor, the directors, the Knoxville Utilities Board and council on matters concerning personnel administration.

(4) To make any investigation which it deems necessary concerning the administration of personnel under the authority of this charter with the power to administer oaths and to secure, by subpoena, in the name of the city, the attendance and testimony of witnesses and the production of records and papers

relevant to such investigations.

(5) To exempt positions from the classified service in accordance with section 1002 above.

(6) To hear or designate a hearing examiner to hear appeals submitted by any employee in a classified position relative to any personnel action adverse to such employee, including, but not limited to, suspension, demotion, discharge, or any disciplinary action, and to receive and determine facts concerning the personnel action. The hearing examiner shall be selected from a list of individuals the board finds qualified. The executive secretary shall not serve as the hearing examiner.

(7) To order that payment of salaries cease at such time as it is determined that any person holding a classified position has not been appointed through the merit system procedures.

(8) To hear allegations of any persons on matters of discrimination in hiring, transfer or promotion, neglect of duty, or other violations of merit system principles as established by the charter.

(9) To review, upon written request of an aggrieved party or upon its own motion, the application and effect of any rule, regulation or decision of the board or any authority thereunder.

(10) To take all further and necessary action as it may determine to preserve and protect the civil service

merit system and to enforce its rules, regulations and procedures.

(11) To develop a program to provide for equal employment opportunities to all employees and applicants for employment with regard to all aspects of employment.

(12) To direct that personnel practices which are inconsistent with or in violation of the provision of this [charter,] or rules and regulations promulgated pursuant to and consistent with this charter, cease and desist and have the power to seek enforcement of its orders by judicial proceedings.

* * *

EXHIBIT

BEFORE THE CIVIL SERVICE MERIT BOARD

FRANK POTTER, WILLIAM H. McGINNIS, KENNETH SCARBROUGH, AND WILLIAM POTTER,
Grievants,

v.

KNOXVILLE FIRE DEPARTMENT,
Respondent.

WILLIAM W. PETTY
HEARING OFFICER FOR THE
CIVIL SERVICE MERIT BOARD

ORDER STAYING

Whereas an action has been filed in Federal Court by the above-named grievants which action encompasses among other things the issues presented herein.

It is therefore ORDERED, ADJUDGED and DECREED that this matter is stayed until further Order of this Hearing Officer.

ENTERED this 19th day of December, 1996.

/s/_____
William W. Petty, Hearing Officer

APPROVED FOR ENTRY:

/s/_____
Wanda G. Sobieski
Attorney for Plaintiffs

Sobieski, Messer & Associates
900 S. Gay Street, Suite 1801
Knoxville, Tennessee 37902
(423) 546-7770
(423) 546-7969 (Fax)
BPR # 009970

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order Staying has been forwarded to counsel for the opposing party via U.S. Mail, postage prepaid.

Thomas A. Varlan
Law Director, City of Knoxville
City-Council Building
P.O. Box 1631
Knoxville, TN 37901-1631

This 19th day of December, 1996.

/s/_____
Wanda Sobieski
Attorney

EXHIBIT

GARY G. SHARPE, WILLIAM G. POTTER, KENNETH F. SCARBROUGH, FRANK E. POTTER, and WILLIAM H. McGINNIS,
Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, in his individual and official capacities, MAYOR VICTOR ASHE, in his individual and official capacities, DEPUTY FIRE CHIEF ROBERT PRESSLEY, in his individual and official capacities, and THE CITY OF KNOXVILLE,
Defendants.

JURY DEMAND

AFFIDAVIT

I, THOMAS PATRICK ARMSTRONG, after first being duly sworn according to law do hereby state and depose as follows:

1. My name is Thomas Patrick Armstrong and I am employed by the City of Knoxville, Tennessee as Fire Planning and Operations Manager for the City of Knoxville Fire Department ("KFD"). I have personal knowledge of the facts stated herein.

2. As Fire Planning and Operations Manager for

KFD, I am responsible for administering the payroll, including without limitation the salary, overtime compensation and other benefit adjustments to compensation (hereinafter collectively referred to as "Payroll") and the pension plans, of the uniformed and non-uniformed members of KFD. There are 370 employees of KFD, which is the second largest department for personnel in the City of Knoxville which has 1620 total full-time employees. I am familiar with the Payroll and pension plans of all of the Plaintiffs in the above captioned lawsuit.

3. Each uniformed member of the KFD is compensated by payment of an annual base salary which is paid in equal bi-weekly installments. An hourly rate of pay is used for purposes of calculating overtime compensation. Hours worked for purposes of computing overtime compensation in the Firefighting Division of the KFD is computed by using what is known as the Section 7(k) exemption under Section 7(k) of the Fair Labor Standards Act (the "7(k) exemption"). The 7(k) exemption method of computing overtime compensation is based upon a 28-day work period (or less, but not less than seven days) and requires no overtime compensation until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28. The above described method of computing overtime under the 7(k) exemption method is set out in 29 CFR §553.230 which the KFD has adopted for use in computing overtime compensation in the Firefighting Division. A copy of §553.230 is attached hereto as Exhibit 1.

4. I have reviewed Payroll information relative to

Deputy Chief William Potter from and after July 1, 1995 to the present date and determined that he sustained no loss in compensation as a result of his transfer on September 26, 1995 from the administrative offices to headquarters of the KFD. Deputy Chief Potter continued to work 40 hours per week after the transfer to headquarters the same as he had worked prior to the transfer. Deputy Chief Potter maintained the same rank/classification of Deputy Chief and he remained at the same pay step with no reduction in pay.

5. On February 1, 1996, when Deputy Chief Potter was transferred to the Firefighting Division as a result of the abolition of the Deputy Chief's position in Administration over firefighting, Deputy Chief Potter maintained the same rank/classification and the same base salary but began working shifts which consisted of a maximum of ten 24-hour shifts and a minimum of nine 24-hour shifts in a 28-day work period. This shift schedule resulted in Deputy Chief Potter working an average of 56 hours per week or an average of sixteen hours more per week than he was working prior to February 1, 1996. Deputy Chief Potter's average hourly rate for purposes of calculating overtime was changed to $15.1817 after February 1, 1996 because his base salary was divided by the greater number of scheduled hours of work. After July 6, 1996, Deputy Chief Potter's average hourly rate changed to $15.5407 as a result of the annual salary adjustment given to all City of Knoxville employees effective the first bi-weekly pay period of the new fiscal year. Deputy Chief Potter's hourly rate for overtime purposes had he continued working a 40 hour work week after February 1, 1996 would have been $21.2544 prior to July 7, 1996 and $21.7570 from and after July 7, 1996. To my knowledge Deputy Chief Potter never worked any overtime

for which overtime compensation was paid or due to be paid during the time he worked in the Administration of KFD.

6. Deputy Chief Potter was never placed on the 7(k) exemption scale of maximum hours worked for purposes of computing overtime compensation and therefore has been paid overtime compensation at one and one-half times the hourly rate of $15.1817 between February 1, 1996 and July 6, 1996 and one and one-half times the hourly rate of $15.5407 from and after July 7, 1996 for all hours worked over 160 hours in the 28-day work period as opposed to the 212 maximum hour threshold. Moreover, as a result of working the shift schedule Deputy Chief Potter receives additional half-time pay for the additional scheduled hours (sometimes called "cycle pay") in the 28-day work period, which hours are either 4 additional hours or 28 additional hours depending upon whether he works 9 or 10 shifts in the work period.

7. While Deputy Chief Potter's hourly rate for purposes of calculating overtime was changed after February 1, 1996 as explained above, his effective hourly rate based upon total compensation (i.e. annual salary plus overtime compensation) divided by total scheduled hours essentially changed very little once he began working the shift schedule. Deputy Chief Potter's effective hourly rate for the time period between February 1, 1996 and July 6, 1996 was $20.5261, and his effective hourly rate from and after July 6, 1996 has been $21.4141. This effective hourly rate actually received by Deputy Chief Potter when compared with his projected hourly rate after February 1, 1996 computed as if he continued working a 40 hour work week is graphically demonstrated as follows:

	40 Hour Work Week (Projected)	56 Hour Work Week
February 1, 1996 to July 6, 1996	$21.2544	$20.526
July 7/96 to present	$21.7570	$21.4141

8. Attached hereto as Exhibit 2 is an analysis of Deputy Chief Potter's total compensation (i.e. annual salary plus longevity plus overtime compensation) and his scheduled hours from and after February 1, 1996 to the present. A comparison between Deputy Chief Potter's total compensation (i.e. regular annual salary plus longevity plus overtime) actually received from and after February 1, 1996 to the present $80,358.51, and the projected total compensation computed as if Deputy Chief Potter had continued working the 40 hour work week from and after February 1, 1996 to the present (i.e. regular annual salary plus longevity), $58,696.52, reveals that Deputy Chief Potter has actually received $21,661.99 in additional compensation as a result of his transfer to the firefighting division.

9. The method of calculation by which Deputy Chief Potter's overtime compensation is being paid (see para. 6 above) results in greater overtime compensation being paid to him than the overtime compensation which is paid to the other two firefighting Deputy Chiefs, Hugh G. Hamlin and James R. Palmer. A comparison of the three firefighting Deputy Chiefs total compensation (i.e. annual salary plus longevity plus overtime compensation) for the time period from and after February 1, 1996 is attached hereto as

Exhibit 3.

10. Of the five Plaintiffs, only William Potter and William McGinnis are participants in Plan F of the City of Knoxville Pension System. The City of Knoxville Pension System is governed by the City Charter. Any and all amendments or modifications to Plan F require charter amendments to be passed by a majority vote of the citizens of the City of Knoxville. Neither Mayor Ashe, Fire Chief Cureton or Deputy Fire Chief Pressley have authority or power to modify or amend Plan F.

11. I am familiar with the location of the various fire stations located throughout the City of Knoxville and have attached hereto as Exhibit 4 a copy of a map showing all of the various stations designated by firehall number.

FURTHER AFFIANT SAYETH NAUGHT.

/s/_____
THOMAS PATRICK ARMSTRONG

SWORN to and SUBSCRIBED to me this 21st day of May, 1997.

/s/_____
Karen L. Wattle
NOTARY PUBLIC

EXHIBIT

GARY G. SHARPE, WILLIAM G. POTTER, KENNETH F. SCARBROUGH, FRANK E. POTTER, and WILLIAM H. McGINNIS,
Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, in his individual and official capacities, MAYOR VICTOR ASHE, in his individual and official capacities, DEPUTY FIRE CHIEF ROBERT PRESSLEY, in his individual and official capacities, and THE CITY OF KNOXVILLE,
Defendants.

JURY DEMAND

AFFIDAVIT

I, THOMAS PATRICK ARMSTRONG, after first being duly sworn according to law do hereby state and depose as follows:

1. My name is Thomas Patrick Armstrong and I am employed by the City of Knoxville, Tennessee as Fire Planning and Operations Manager for the City of Knoxville Fire Department ("KFD"). I have personal knowledge of the facts stated herein.

2. As Fire Planning and Operations Manager for

KFD, I am responsible for administering the payroll, including without limitation the salary, overtime compensation and other benefit adjustments to compensation (hereinafter collectively referred to as "Payroll") and the pension plans, of the uniformed and non-uniformed members of KFD. There are 370 employees of KFD, which is the second largest department for personnel in the City of Knoxville which has 1620 total full-time employees. I am familiar with the Payroll and pension plans of all of the Plaintiffs in the above captioned lawsuit.

3. I have reviewed Payroll information concerning Frank Potter, William McGinnis and Kenneth Scarbrough from July 1, 1995 to the present date. None of these individuals incurred a loss or reduction in their salary as a result of their transfers from one fire hall to another. William McGinnis initially sustained a loss of one day's "cycle pay" in the amount of $145.15 as a result of being transferred from the "Blue" shift to the "Red" shift because these two shifts were on different 28-day work periods under the 7(k) exemption shift schedule. However, William McGinnis was offered reimbursement of such amount of one day's "cycle pay" to settle and resolve his grievance before the instant lawsuit was filed.

4. William McGinnis is a participant in Plan F of the City of Knoxville Pension System. The City of Knoxville Pension System is governed by the City Charter. Any and all amendments or modifications to Plan F require charter amendments to be passed by a majority vote of the citizens of the City of Knoxville. Neither Mayor Ashe, Fire Chief Cureton or Deputy Fire Chief Pressley have authority or power to modify or amend Plan F.

5. I am familiar with the location of the various fire stations located throughout the City of Knoxville and have attached hereto as Exhibit 1 a copy of a map showing all of the various stations designated by fire hall number.

FURTHER AFFIANT SAYETH NAUGHT.

/s/_____
THOMAS PATRICK ARMSTRONG

SWORN to and SUBSCRIBED to me this 21st day of May, 1997.

/s/_____
Karen L. Wattle
NOTARY PUBLIC

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 2/11/99]

No. 97-6428

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. MCGINNIS,
Plaintiffs-Appellees,

v.

BRUCE CURETON, Chief, Individually and in his Official Capacity as Fire Chief; VICTOR ASHE, Mayor, individually and in his Official Capacity as Mayor; ROBERT PRESSLEY, Individually and in his official Capacity as Deputy Fire Chief,
Defendants-Appellants,

CITY OF KNOXVILLE,
Defendant.

Before: NELSON, SURHEINRICH, and MOORE, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed by the defendants,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX F

AMENDMENT 1 - UNITED STATES CONSTITUTION

Religious and political freedom. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX G

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 — CIVIL RIGHTS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.